Ontario *Human Rights Code*
R.S.O 1990, c. H.19

BOARD OF INQUIRY

BETWEEN:

Ontario Human Rights Commission

Commission

- and -

Cynthia Jack

Complainant

- and -

Metro Toronto Reference Library
Margot Hewings

Respondents

INTERIM DECISION

Board of Inquiry: Katherine Laird

Appearances: Peter Abrahams
Counsel for the Commission

David Brady
Counsel for the Respondents

Dates of Hearing: October 6 and 13, 1994
November 9, 1994

Place of Hearing: Toronto

1. *Introduction*

This Board of Inquiry was appointed by the Minister of Citizenship on June 10th, 1994 to hear and decide the Complaint of Cynthia Jack, filed with the Ontario Human Rights Commission on February 1, 1991, alleging discrimination on the basis of race and colour by the named respondents, the Metropolitan Toronto Reference Library, Margot Hewings and Frances Schwenger. Ms. Schwenger was dropped as a respondent before the Board on consent.

2. *Preliminary Issues*

At the commencement of the hearing, counsel for the respondents asked for an order dismissing or permanently staying the Complaint on the grounds summarized below.

2.1 The Commission failed to fulfil its statutory duty under s. 33(1) of the *Human Rights Code* (the "*Code*") to endeavour to effect a settlement of the Complaint. Settlement efforts on the part of the Commission are a condition precedent to a valid request for the appointment of a board of inquiry pursuant to s. 36(1) of the *Code*. The failure of the Commission to fulfil its statutory duty to attempt to settle deprives this Board of jurisdiction to hear the Complaint.

2.2 It would be an abuse of process for the Board to hear the Complaint given the combined impact of the failure on the part of the Commission to:

2.2.1 bring the Complaint forward to a board of inquiry in a timely manner and without excessive delay;

2.2.2 conduct a fair, unbiased and non-abusive investigation;

2.2.3 provide appropriate disclosure and sufficient particulars to enable the respondents to know the case to be met and to respond.

3. *Evidence*

Counsel for the respondents produced four witnesses in support of its motion: Linda Jenkins, a Compensation and Benefits Officer with the Library; Joseph LeForte, Manager of Personnel and Labour Relations; Margot Hewings, Manager of the Business and Social Sciences Department and named as a respondent in the Complaint; and Michael Kennedy, another solicitor with the firm. Counsel for the Commission called Delores Smith, one of the Human Rights Officers who had handled the file.

The evidence of all of the witnesses was generally credible. Although there was a clear difference in the interpretation of events as between the Human Rights Officer and the respondent witnesses, there was no significant differences in their factual evidence as to the history of this Complaint. The evidence accepted by the Board as to the background and history of the Complaint is summarized below. Where witnesses differed in their characterization of the facts, that is noted.

3.1 The job competitions at issue before this Board took place in the spring of 1990 and were for the positions of Senior Collection Librarian (Competition L-07-90) and Librarian Supervisor (Competition TL-01-90) in the Business and Social Sciences Department. One of the interviewers for the Senior Collection Librarian position is now deceased.

3.2 In May 1990, the complainant filed grievances with respect to the two competitions. The grievances were settled in September 1990 by an agreement which provided that the complainant would be appointed to the position of Librarian II Supervisor for a temporary period from October 1, 1990 to May 1, 1991. Subsequent to settlement of the grievances, the files from the competitions were destroyed as part of the library's file disposal process.

3.3 The Complaint was filed with the Commission on February 1, 1991.

3.4 The Complaint was forwarded to the respondents by letter dated April 18th, 1991, which letter requested completion of a Respondent Questionnaire. (Only the letter from the Commission to Margot Hewings was introduced in evidence.)

3.5 The Respondent's Questionnaire was completed by Mr. LeForte, Manager, Personnel and Labour Relations on May 16, 1991, and forwarded to the Commission.

3.6 There was no evidence of further contact with the Commission until on or about January 6, 1992, when the respondents received a letter from the Commission dated December 16, 1991. The letter advised that the Complaint of Cynthia Jack had been transferred to the Task Force established by the Government of Ontario to reduce the backlog of human rights complaints. The respondents were advised that they would be contacted by the officer assigned to handle the Complaint in due course.

3.7 On August 7, 1992, Mr. LeForte, Manager, Personnel and Labour Relations, received a letter dated August 6, 1991, from Delores Smith, Human Rights Officer, advising that the Complaint had been assigned to her for handling.

3.8 Between August 7 and September 25, 1992, Delores Smith contacted Mr. LeForte by telephone on a number of occasions to discuss the issues raised in the Complaint.

3.9 On September 25, 1992, Mr. LeForte received by Facsimile a letter from Ms. Smith confirming a telephone conversation which had arranged for a "conciliation meeting" to take place on September 30, 1992 "to review investigation findings with you".

3.10 On September 30, 1992, a meeting took place at the library between Mr. LeForte and Ms. Smith. Although the purpose and tenor of that meeting are in dispute, the evidence of both Mr. LeForte and Ms. Smith is that Ms. Smith outlined the findings which the Commission had made in its investigation. Mr. LeForte's evidence is that he requested further particulars of many allegations. Ms. Smith recalls repeated requests for the names of people who had given information to the Commission. Mr. LeForte testified that Ms. Smith did not seem interested in any information that he had, and that it appeared that her mind was made up. Ms. Smith confirmed that her investigation at that point had lead her to believe that there might be evidence to support the Complaint. She recalled that Mr. LeForte was not hostile during the interview, but that there was "not much response". Ms. Smith testified that he was advised at the end of the meeting that the investigation was continuing.

With respect to the purpose of the meeting, Ms. Smith gave evidence that, in setting up the meeting, she was aware of the Commission's duty to attempt settlement and that the purpose of the meeting was to present the highlights of the investigation and "to come to some kind of agreement". Mr. LeForte's evidence regarding the meeting was that there was never, in his mind. any kind of settlement discussion. Upon objection by counsel for the respondents, the Board ruled that Ms. Smith could not testify as to her recollection of any settlement discussion at the September 30th meeting, as Mr. LeForte had not been properly cross-examined on this point: *Browne v. Dunn* (1893), 6 R. 67 (H.L.); *Re Laidlaw Waste Systems Ltd. and C.U.P.E.* (1993) 37 L.A.C. (4th) 146.

3.11 On September 11, 1992, Margot Hewings was interviewed by Ms. Smith. The interview lasted from mid-afternoon until well into the evening. Ms. Hewings described Ms. Smith's manner as insistent and the interview as "not very objective". Ms. Hewings felt that Ms. Smith was "trying to get out all the negatives". Ms. Hewings was asked to sign the "Witness Statement" at the end of the interview, but she objected and asked to be allowed to go home. It was agreed that she would

review and sign the notes on another day. At no time during the interview did Ms. Smith advise Ms. Hewings of her right to obtain counsel, or determine if she understood that she was a respondent to the complaint. Ms. Smith testified that she assumed Ms. Hewings had understood from the correspondence that she was a respondent. Ms. Hewings denied that she had appreciated this fact and noted that Ms. Smith had warned her that the law required her to co-operate.

3.12 On October 6, 1992, Mr. LeForte wrote to Ms. Smith requesting "particulars of the various situations where you indicate the Library has or may have discriminated". Mr. LeForte referred to "12 events or circumstances that unnamed witnesses have spoken to you about" and asked for "detailed information with respect to each, including names". In a subsequent telephone call, Mr. LeForte was advised that the Commission would not be providing names.

3.13 On November 12, 1992, Ms. Smith wrote to Mr. LeForte advising him that she would be contacting department heads to obtain a "workforce breakdown by race (i.e. blacks and non-blacks)".

3.14 Between November 12 and December 14, 1992, Linda Jenkins, Compensation and Benefits Officer with the library, spoke to Ms. Smith on at least two occasions regarding the request to provide a racial breakdown of the workplace. The library had a number of concerns about the collection of this kind of data, which concerns were outlined by Ms. Jenkins in her evidence to include: the privacy rights of employees; the two-week timeframe for the collection of the data; the lack of time to meet with and prepare employees; the accuracy of the data; the absence of clear racial definitions; the difficult position that managers would be in if asked to identify employees by race. The library did not want managers to identify visible minority employees; it took the position that the appropriate approach was a survey which would allow employees to self-identify.

3.15 The request from the Commission for a racial breakdown was dropped by Ms. Smith at this time, as confirmed by letter from Ms. Jenkins dated December 14, 1992. Although Ms. Smith initially stated in testimony that she did not believe the request was dropped, her subsequent review of the file in giving evidence confirmed that she had agreed that the request was not to be pursued at that time.

3.16 In cross-examination, Ms. Smith was asked to explain why she had not pursued certain other lines of inquiry in her investigation, in areas in which, it was suggested, she would have uncovered evidence supporting the library's case. She was also asked whether at each stage she had checked her findings with the respondents to confirm accuracy. Ms. Smith

admitted not making further inquiries in some areas, and not giving the personal respondent Margot Hewings an opportunity to comment on investigative findings subsequent to her interview. However, Ms. Smith defended her investigation, saying that the purpose of the investigation is to get an overview of the situation, and that the respondents would have an opportunity before the Board to refute her findings.

3.17 Ms. Smith left the Commission in December 1992, and there was no evidence of further contact between the Commission and the respondents until August 25, 1993, when Linda Jenkins (then on secondment) was called by Kevin Williams, a Commission employee, who inquired as to her racial background. Ms. Jenkins' undisputed evidence was that Mr. Williams had an aggressive and sarcastic manner which she found intimidating. She objected to answering his question and Mr. Williams told her that in fact the Commission already had information about her racial background in the file. Ms. Jenkins testified that she heard that the Commission was at this time calling some employees at home to inquire as to their racial background. Ms. Hewings testified that she received calls at home from Mr. Williams but did not speak to him.

3.18 Ms. Jenkins complained of Mr. Williams behaviour to the Commission and to the Information and Privacy Commission. On January 28, 1994, she received an apology from Mr. Williams and from the Manager of the Special Task Force.

3.19 On December 6, 1993, Mr. LeForte received on behalf of the Library, a copy of the Case Analysis/Report. The letter advised him that the Commission had been unable to resolve the complaint through investigation and conciliation, and that it would now be going to the Commissioners for a decision as to whether or not a board of inquiry should be appointed.

3.20 On February 9, 1994, counsel for the respondents wrote to the Commission stating that procedural fairness required the disclosure of particulars with respect to the allegations in the Case Analysis, and that preparation of a response to the Case Analysis would otherwise be "difficult if not impossible". In the same letter, counsel advised that "no efforts have been made to resolve this complaint through conciliation" and that the respondents "would welcome the opportunity to discuss a negotiated resolution".

3.21 On February 18, 1994, counsel for the respondents wrote again to the Commission confirming a conversation earlier in the week to the effect that the Commission would be sending "in the near future a letter setting out the terms on which the complainant and the Commission would be willing to settle this compliant".

3.22 On March 2, 1994, the Commission sent a letter to respondent counsel setting out a settlement proposal submitted by the complainant. The Commission undertook to contact counsel over the next week "to ascertain the possibility of resolving this matter".

3.23 On March 9, 1994, counsel for the respondents sent a letter back to the Commission setting out "the terms upon which the Library would be willing to settle this matter". The letter requested that a meeting be convened to discuss settlement.

3.24 Mr. Kennedy testified that he received a call from the Commission on March 14, 1994, seeking clarification of the respondents' proposal, but no further response to the March 9th letter.

3.25 On March 15, 1994, counsel for the respondents forwarded to the Commission a reply to the Case Analysis which dealt with many issues including the respondents' position that there had not been appropriate disclosure or conciliation efforts.

3.26 The respondents subsequently received a letter from the Commission dated April 14, 1992, advising that a decision had been made to request the appointment of a board of inquiry.

3.27 In correspondence to Commission counsel between July and September 1994, respondent counsel repeatedly asked for particulars and full disclosure of the Commission file. Commission counsel responded to the correspondence and undertook to disclose the "fruits" of the investigation and all witness statements.

3.28 On September 30, 1994, Mr. Kennedy attended at the offices of Commission counsel and was able to review the file. By letter dated October 4, 1994, Commission counsel sent a copy of the Commission's investigation file to respondent counsel.

4. *Submissions*

4.1 Jurisdiction of Board of Inquiry

Counsel for the respondents argued that the Board of Inquiry did not have jurisdiction to hear the complaint due to a failure on the part of the Commission to fulfil its statutory duty to endeavour to effect a settlement under s. 33(1) of the *Code*. Relying on the case of *Ontario Human Rights Commission v. Four Star Variety et al.* (unreported decision of Ontario Board of Inquiry, October 22, 1993), it was argued that settlement efforts are a condition precedent to a valid request for the appointment of a board of inquiry under s. 36(1).

In support of his submissions on this point, counsel relied on the testimony of Mr. LeForte that no settlement discussion took place at the September 1992 meeting, and on the failure of the Commission to set up any further conciliation meeting even after the letter of March 9, 1994 in which the respondents requested a meeting.

Commission counsel argued that *Four Star Variety* should not be followed; in that case the Commission admitted that there had been no settlement initiatives whatsoever. He relied on the fact that a so-called conciliation meeting had taken place, even if there was no evidence before the Board of actual settlement discussion at the meeting. He also relied on the evidence that the Commission had communicated a settlement proposal to the respondents.

It was submitted by Commission counsel that the Board should follow the approach taken in *Naraine v. Ford Motor Company* (unreported decision, Ontario Board of Inquiry, April 21, 1994) and in *Slung and Agyeman v. Geiger International et al.* (unreported decision, Ontario Board of Inquiry, July 6, 1993). In both these decisions, the Board of Inquiry refused to find that less-than-thorough settlement efforts were fatal to their jurisdiction.

4.2 Abuse of Process

The submissions of respondent counsel on abuse of process urged the Board to follow the approach taken in *Shreve v. Ontario Human Commission and Hancock* (1993), 18 C.H.R.R. D/363. In that case, the Board held that the respondents had been deprived of the right to a fair hearing by virtue of the cumulative effect of delay, a biased investigation and restricted disclosure, even though each factor taken separately would not be sufficient to result in abuse of process justifying dismissal.

The submissions of both counsel on each of the components of the approach taken in *Shreve* are set out below.

4.2.1 Delay

Counsel for the respondents relied on the death of an important witness and the destruction of key documents from the competition in arguing the respondents would be prejudiced by the delay of over four years between the filing of the complaint and the commencement of the hearing.

Commission counsel urged the Board to adopt the test followed in many board of inquiry decisions to the effect that a complaint should not be dismissed for delay unless the passage of time has made it impossible for the Board to determine whether a breach of the *Code* occurred. He argued that in this case the delay had not made it impossible for the Board to hold a fair hearing.

4.2.2 Bias in Investigation

Counsel for the respondents argued that the officer's evidence demonstrated that she was not interested in investigating circumstances which might have lead to a conclusion that the library had not discriminated. He argued that the investigation by Ms. Smith was one-sided and heavy-handed, that the Commission was uninterested in getting the respondents' side of the story.

He characterized Ms. Smith as having essentially tried to bully Ms. Hewings into signing a witness statement after a long interview during which she was told that the law required her to co-operate, but not told that she could retain counsel. It was argued that she later tried to push Ms. Jenkins into undertaking an ill-defined and problematic race survey.

Other evidence cited of an abusive investigation included the telephone calls by Mr. Williams to Ms. Jenkins, and the telephone survey of employees to solicit a racial breakdown of staff. This approach to obtaining a racial breakdown was contrasted with the requirements of the *Employment Equity Act* (S.O. 1993, c.35), proclaimed September 1, 1994, which are based on a self-identification model.

Counsel for the Commission argued that the Board should not find bias merely on the basis that the investigating officer had made some preliminary judgements prior to the September meeting. He pointed to the fact that the officer had not supported the complainant with respect to her allegations that she had been treated unequally in vacation time. These allegations in the Complaint have not been taken forward by the Commission to this Board of Inquiry. He pointed to the fact that the Officer's evidence indicated that she had spoken to numerous employees at all levels and of all racial backgrounds.

4.2.3 Disclosure and Particulars

Counsel for the respondents submitted that there was a failure on the part of the Commission to fairly disclose findings at all stages of the investigation, as well as a failure to give the respondents sufficient particulars to allow them to answer the allegations against them. These failures were said to have undermined the prospects for settlement as the respondents were not able to consider or refute vague allegations from unknown sources.

The respondents conceded that the Commission had disclosed the entire file as this hearing began. However, it was argued that even if disclosure at that late stage was sufficient to satisfy the standard set in *Re Ontario Human Rights Commission and Northwestern Hospital* ((1993), 20 C.H.R.R. D/492; application for judicial

review dismissed (1993), 20 C.H.R.R. D/498 (Ont.Div.Ct.) disclosure of the file did not relieve the Commission of its responsibility to provide sufficient particulars. In making this argument, counsel pointed to the failure of the Commission to give particulars in respect of the "Similar Fact Evidence" set out in the Case Analysis. Relying on *Adair v. K.B. Home Insulation et al* (1992) 15 C.H.R.R. D/331 and *Bhadauria V. Toronto Board of Education* (1983) 9 C.H.R.R. D/4501, it was submitted that large volumes of material were no substitute for information of sufficient precision to allow the respondents to know the circumstances behind the allegations to be addressed.

5. *Analysis*

5.1 Jurisdiction

The present case can be distinguished from *Four Star Variety, supra* in which it was admitted by the Commission that there were no efforts whatsoever to initiate settlement discussions. The Board finds on the evidence that the Commission made minimal efforts towards settlement in scheduling a "conciliation meeting" and in communicating to the respondents the proposal of the complainant. There was also evidence that the Commission reviewed the counter proposal at least to the extent that there was a call to respondent counsel to clarify the proposal.

There was no evidence as to why the Commission did not schedule a conciliation meeting in March 1994 when requested to do so by the respondents. A review of the two settlement proposals exchanged at that time suggests that the Commission may have concluded that the complainant and the respondents were too far apart.

Be that as it may, it is the view of this Board that, although the settlement efforts of the Commission in this case appear to have been inadequate, the **sufficiency** of settlement efforts at the Commission are not an issue going to the jurisdiction of a board of inquiry. The *Code* only requires that the Commission endeavour to effect a settlement (s.33(1)). Failure to effect a settlement is made a precondition to a request for the appointment of a board of inquiry (s.36(1)), but where the evidence demonstrates some effort, however inadequate, it is not the task of a board to review the sufficiency of the efforts as an issue going to its own jurisdiction.

The mandate of a board of inquiry is established in s.39(1) of the *Code*:

> s.39(1) The board of inquiry shall hold a hearing,
>
> (a) to determine whether a right of the complainant under the Act has been infringed;

(b) to determine who infringed the right;

(c) to decide upon an appropriate order under s.41

and the hearing shall be commenced within thirty days after the date on which the members were appointed.

The task before a board of inquiry is statutorily defined and does not include a review of the conduct of the Commission and the handling of a complaint prior to the appointment of a board. Issues relating to how the Commission dealt with a complaint are not appropriately argued before a board unless there are circumstances which raise abuse of process questions under s. 23 of the *Statutory Powers Procedure Act* (R.S.O. 1990, c. S.22). Section 23 provides that a Board of Inquiry may make an order "to prevent an abuse of its processes". The respondents have not demonstrated that it would be an abuse of the processes of the Board of Inquiry for this case to proceed. A decision dismissing or staying a complaint for abuse of process will be appropriate only if it would be impossible for the Board to hold a fair hearing into the issues before it.

Although it was inappropriate for the Commission to not take up the request of counsel for a further conciliation meeting, the decision to proceed to a board would have been made with the knowledge that mediation meetings are now scheduled by the Board of Inquiry Office before all hearings. The parties in this matter are scheduled to attend a Board of Inquiry Office mediation meeting before the hearing is reconvened. If this matter does proceed to a hearing on the merits, the inadequate settlement efforts on the part of the Commission prior to the appointment of a board of inquiry will not prevent this Board from holding a fair hearing into the question of whether a right of the complainant under the *Code* has been infringed.

5.2 Abuse of Process

5.2.1 Delay

Although the evidence in this case does establish that there was an unacceptable delay in the Commission's handling of the Complaint, resulting in the loss of valuable evidence, this Board is not satisfied at this stage that the respondents have demonstrated such prejudice as to make it impossible for a fair hearing to be held. The standard for dismissing a complaint for delay has been held to be a high one, requiring a balancing of the rights of the respondent to a fair and timely hearing as against the rights of the complainant to a determination of the merits of the complaint. Boards of inquiry have held that dismissal will only be appropriate where the delay has resulted in demonstrated prejudice such as to undermine the fairness of the hearing and make it impossible for

the board to make a determination as to whether there has been a violation of the *Code*: *Hyman v. Southam Murray Printing (No.1)* (1982), 3 C.H.R.R. d/617; *Maddox v. Vogue Shoes* (unreported, Ont. Board of Inquiry, April 8, 1991); *Quereshi v. Central High School of Commerce* (1988), 9 C.H.R.R. D/4527; *Gohm v. Domtar* (1989) 10 C.H.R.R. D/5968; *Naraine v. Ford Motor Company* (unreported, Ont. Board of Inquiry, April 21, 1994). See also *Nisbett v.Manitoba Human Rights Commission*, [1992] 3 W.W.R. 582 (Man. C.A.)

It was clear from the evidence led on the preliminary motions, that all the witnesses called had very detailed and accurate recollection of the key events in the investigation. It remains to be seen whether this will be true as the hearing moves into consideration of events which took place before the Commission became involved. It is accordingly premature to consider at this point whether the respondents have suffered incurable prejudice as a result of the loss of evidence. The respondents may at any time during the hearing on the merits renew their application for dismissal or a stay on the basis of demonstrated prejudice.

5.2.2. Bias in Investigation

The personal respondent and the library's senior staff clearly found the Human Rights Commission investigation to be rushed, one-sided and heavy-handed, and there was some justification for this perception. The Officer agreed that her findings led her to believe that the Complaint might have merit by the time she met with Mr. LeForte. Her mind was, to a significant degree, made up as to the merits of the Complaint prior to the meeting. This must have come through clearly in her manner, reinforcing the perception on the part of the respondents' representatives that she was only investigating the case against them.

As well, it was not disputed that the investigation, once it finally started, was kept in a tight time frame. Understandably, this resulted in the Officer putting some pressure on the respondents and their representatives to respond quickly. The goal of the Task Force which handled this Complaint was to complete investigation of all its files by December 1992, when the investigation work on this file was essentially wrapped up and the temporary employment of the investigating Officer over. Although the Officer appears to have put considerable effort into her investigation, there were some leads which were inevitably not pursued. The Officer was able to explain her reasons for certain investigation choices, but clearly some of the matters not pursued may have led to evidence favourable to the respondents.

The respondents' dissatisfaction with the Commission's investigation was considerably heightened by the eleventh hour involvement of Mr. Williams. The efforts of the Commission in the summer/fall of 1993 to obtain a racial breakdown of staff were

badly handled, particularly in Mr. Williams' dealings with Ms. Jenkins. His conduct was an abuse of the authority given to him; the apology received by Ms. Jenkins was well deserved.

Having said that, the Board does not accept the argument that the Commission should be taken to task for not conducting a survey in accordance with the provisions of the *Employment Equity Act*. Employment equity legislation was required in part because the type of survey required by that legislation can not easily or often be done as part of a human rights investigation of an individual complaint. Hopefully, with this new legislation, there will be fewer complaints, and fewer investigations, like the one before this Board. The methods used to obtain a racial breakdown of staff in this case were insensitive, divisive and unreliable.

In reviewing the conduct of the investigation, it should be noted that the Officer was working under a statutory scheme which has been the subject of much public criticism in Ontario in part because it places contradictory demands on the Commission and its staff. On the one hand, the Officer is supposed to be neutral in her investigation and conciliation efforts, but she must work quickly once the investigation is begun, and must make a recommendation to the Commissioners as to whether or not a board should be requested. Once a decision is made to appoint a board, the Commission has carriage of the Complaint, and leads the evidence in support of the complainant and against the respondent at the hearing. This role reversal at the hearing stage must inevitably have a trickle-down effect on the investigation and conciliation efforts. As an Officer moves closer to a conclusion that her recommendation will be for the appointment of a board, it is not surprising that the neutrality of the investigation and conciliation would be affected.

The Commission itself, in its May 1992 submission to the Ontario Human Rights Code Review Task Force, noted the difficulty of its position as follows:

> "The current mandate of the Commission encompasses both advocacy responsibilities (e.g., public education; representation of complainants at a hearing; promotion of policy goals in Preamble) and functions which presuppose neutrality (e.g., investigation of complaint; decisions as to whether a complaint proceeds to a hearing). We believe this duality is untenable. Each function detracts from the Commission's credibility in relation to the other function. The duality costs the Commission in terms of credibility and creates procedural delay as conflicting roles are juggled."

It may be that it is at the conciliation stage that the role of the Commission becomes most problematic in cases in which the complaint appears to the Officer to have merit. It is not surprising that, in our case, it is at the point of the so-called conciliation meeting,

that the respondent library becomes truly dissatisfied with the process. It will be difficult for an Officer to play a neutral role as between the parties in attempting to effect a settlement, when it is his/her own investigation findings supporting the complaint which will inevitably be used to provide the impetus for any movement towards settlement. It is not surprising that many respondents appear to find the conciliation process before the Commission to be unsatisfactory.

It is unfair to place responsibility for a flawed process on this particular Officer, who appeared to have been surprised that the respondents became critical during the investigation. It must be difficult to do a human rights investigation that does not leave at least one side feeling as if they have not been treated even-handedly at some stage in the process. The right of a complainant to a hearing can not be dependant on a finding that the investigation has been conducted in even-handed manner at all stages, because such an investigation is difficult to achieve under the present statutory scheme. In our case, the difficulties were compounded by the fact that the investigation/conciliation were handled by a special Task Force established with a time-limited mandate to deal with a group of backlogged human rights complaints.

Accordingly, boards of inquiry must be very cautious in considering applications for dismissal on the basis of a biased investigation amounting to abuse of process. As stated above, it is not the responsibility of boards of inquiry to review the conduct of the Commission prior to its appointment. The authority of a board of inquiry under s. 23 of the *Statutory Powers Procedure Act* to make orders "to prevent an abuse of its processes" should only be used to dismiss or stay a proceeding under circumstances where it is impossible for the board to afford the parties a fair hearing. Whatever the failings of the investigation in this case, the Board is not prevented from fulfilling the task which it was appointed to perform under s. 39(1) of the *Code*.

5.2.3 Disclosure and Particulars

The Commission has now made full disclosure of its file. Although appropriate pre-hearing disclosure should have been made well in advance of the commencement of this hearing, a number of factors, including the retention of outside counsel, delayed disclosure after the appointment of the Board. The scope of the disclosure certainly satisfies the test established in *Northwestern Hospital, supra*. In that case, the timing of the disclosure was held to be appropriately left to the discretion of Commission counsel. The timing in this case, although unfortunately late, has not resulted in prejudice to the respondents that could not be addressed by an adjournment.

The more important issue in this case is the sufficiency of the particulars. The Board accepts the submissions of respondent counsel that reams of paper are no substitute for precise particulars allowing the respondents to know the case which must be met. Section 8 of the *Statutory Powers Procedures Act* provides:

> Where the good character, propriety of conduct or competence of a party is an issue in a proceeding, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations with respect thereto.

The respondents in this case have apparently not been advised as to the specific allegations to be addressed in the hearing. For example, the respondents are entitled to know if the Commission is going to argue that the competition itself was unfair, and if so, on what basis. In the *Bhaduria v. Toronto Board of Education, supra*, the Commission was ordered to provide particulars of allegations that selection criteria were improper. Is the Commission going to rely on the "similar fact evidence" included in the Case Analysis? If so, it is unclear to the Board if the disclosure has now resulted in the respondents' obtaining sufficient particulars of the circumstances of those allegations.

The Board is not of the view that the failure to provide sufficient particulars has in this case resulted in an abuse of process which would undermine the fairness of the hearing. Had particulars been provided during the investigation, there might have been more likelihood of a settlement, but any unfairness before the Board can be addressed by an adjournment. The Commission must insure that sufficient particulars have now been provided to the respondents through disclosure, and if not, provide further particulars forthwith.

6. Decision

The application of the respondents for an order dismissing or staying the Complaint is dismissed. The Board finds that it has jurisdiction to hear the Complaint, and that proceeding with the hearing will not result in an abuse of process. The evidence does establish that the investigation and conciliation process before the Commission was flawed and unduly delayed. However, the Board is satisfied that this has not affected its jurisdiction or its ability to hold a fair hearing. The Commission is directed to provide appropriate particulars to the respondents forthwith.

K. Laird

Board of Inquiry

November 25/94